UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PHILIP EIL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-cv-99-M-LDA
	)	
U.S. DRUG ENFORCEMENT ADMINISTRATION	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

For more than four years, Plaintiff Philip Eil ("Plaintiff" or "Eil") has been attempting to obtain exhibits from a federal criminal trial that resulted in a sentence of four consecutive life terms for a physician prescriber of controlled substances. Despite his best efforts to obtain these documents through proper channels, various government entities have stymied his attempts, including the United States Drug Enforcement Administration ("DEA" or "Defendant"). In fact, at the direction of the criminal trial's lead prosecutor, Eil filed a Freedom of Information Act ("FOIA") request ("FOIA Request") that the United States Department of Justice ("DOJ") acknowledged receiving on February 28, 2012, 1,476 days ago. As discussed in more detail below, the DEA has wrongfully relied upon several FOIA exemptions to withhold this public information. Plaintiff respectfully requests that this Court find that the DEA wrongfully withheld documents from Plaintiff and order the DEA to provide Plaintiff with the requested information.

II. BACKGROUND

In May 2007, a grand jury for the United States District Court for the Southern District of Ohio returned a 22-count indictment charging Paul Volkman ("Volkman") with conspiring to unlawfully distribute a controlled substance in violation of 21 U.S.C. §841(a), maintaining drug-involved premises in violation of 21 U.S.C. §856(a)(1), the unlawful distribution of a controlled substance leading to death in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. §§ 924(c)(1) and (2). Affidavit of Philip Eil ("Eil Aff., ¶3). In fact, on May 23, 2007, Defendant announced the indictment, stating that Volkman and his co-defendants "handed out more than 1,500,000 pain pills between October 2001 and February 2006," made $3,087,500 from this scheme, allegedly caused the "the deaths of at least 14 people," and that "[t]his indictment serves as a warning to all medical professionals that if you illegally prescribe medication for personal gain you will be prosecuted to the fullest extent of the law." Eil Aff., ¶4.

Volkman attended college and medical school with Plaintiff's father, in the 1960s and 1970s. After the DEA and news outlets broke news of Volkman's indictment, Plaintiff, who was then a journalist in the early stages of his career, began working on a story about Volkman.[1] Eil Aff., ¶5. Specifically, to date, Plaintiff has conducted more than 100 interviews for this project.[2]

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[1] Plaintiff was a freelance professional journalist in 2009, when he learned about this indictment. Volkman had gone to college and medical school with his father in the 1960s and 1970s, and he became intrigued by this story. The question that sparked Plaintiff's interest was, in essence, "How did this man with an MD/PhD from the University of Chicago turn into, according to government's allegations, a prodigious drug dealer and medical mass-murderer?" Plaintiff immediately began conducting research for a book about Volkman and this historic case. Shortly thereafter, in September 2009, Plaintiff enrolled in a graduate nonfiction writing program at the Columbia University School of the Arts, where he chose the Volkman story as his thesis project. He graduated from that Columbia program with a Master of Fine Arts (M.F.A.) degree in May of 2011. Eil Aff., ¶5.

In fact, Plaintiff was not the only journalist seeking to cover Volkman's trial. The Associated Press covered the beginning of the trial and the New York Times recorded the verdict. Eil Aff., ¶¶9, 21.

[2] In fact, in 2010, after one of his interviews with a former patient of Volkman's, an agent for Defendant asked Plaintiff if he was aware of the potential harm of speaking with potential witnesses and he mentioned the

Eil Aff., ¶6. In March 2011, Plaintiff traveled to Ohio in advance of Volkman's trial to observe the trial. Eil Aff., ¶10. The trial lasted eight weeks, during which the government presented 70 witnesses and more than 220 exhibits into evidence. Eil Aff., ¶11. It is noteworthy that neither the Exhibit List, nor the PACER docket shows that any of the exhibits were ordered to be filed under seal. Eil Aff., ¶12.

Plaintiff observed only a small portion of this trial. This is because on March 7, 2011, the fourth day of the trial, he received a subpoena from the government ordering him to appear the following morning to testify in Volkman's trial.[3] Eil Aff., ¶13. That same day, United States Attorney Timothy Oakley alerted the Court to Plaintiff's presence in the courtroom, informed the Court that Plaintiff had been subpoenaed and asked that Plaintiff be required to leave. Eil Aff., ¶14. Plaintiff exited the courtroom. Eil Aff., ¶14. And in one swift motion, his access to the trial, live witness testimony, and any evidence that either side presented was extinguished.[4] Plaintiff did not observe any more of the trial and was never called to testify. Eil Aff., ¶¶18-19.

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possibility that Plaintiff could be charged with witness tampering. Plaintiff also received a Facebook message from that former patient of Volkman's who told him that a DEA agent instructed her to not speak with Plaintiff. Eil Aff., ¶8.

[3] Although the subpoena is dated March 4, 2011, Plaintiff was served on March 7, 2011. Eil Aff., ¶13.

[4] That afternoon, after Plaintiff exited the courtroom, the Court and counsel for the government and Volkman engaged in an on-the-record conversation out of the presence of the jury. Judge Sandra Beckwith asked Attorney Oakley about the "drift of the government's subpoena since [Eil] doesn't appear to have any firsthand knowledge of the case." Attorney Oakley responded that he did not "know if that's the case or not. We know that Mr. Eil has been talking to witnesses in the Portsmouth area. We would have only known about those people from the witness list or from Dr. Volkman. We believe he's been in communication with Dr. Volkman over the time of this." Eil Aff., ¶15, Exhibit F.

Attorney Oakley went on to explain that prior to serving Plaintiff with the subpoena, he had approached him and "asked him if he would please speak with us. We asked him about whether or not he had received a list of witnesses. He respectfully declined to answer. We asked him if he had seen a jury venire and he respectfully declined to answer. At that point he asked if was free to leave and we said yes, and he left. So we felt at this point we would subpoena him and would put him on the witness list because we believe that he may have information about what has transpired[.]" Eil Aff., ¶15, Exhibit F..

In May 2011, a jury found Volkman guilty on all but two counts. Eil Aff., ¶20. Defendant quickly issued a press release, noting, in part, that "Volkman was one of the nation's largest physician dispensers of oxycodone in 2003 and 2005. Evidence presented during the trial showed that Volkman prescribed and dispensed millions of dosages of various drugs including diazepam, hydrocodone, oxycodone, alprazolam, and carisoprodol." Eil Aff., ¶21. Approximately nine months later, Volkman was sentenced and the DEA was again quick to tout the importance of this case and its focus on the diversion of controlled substances, stating in a press release:

> The lengthy investigation into Dr. Paul Volkman, coupled with a life sentence, exemplifies that not only is DEA determined to combat prescription drug abuse in this country, but that the judicial system recognizes the seriousness of the issue in today's society. Addressing the diversion of controlled pharmaceuticals is one of the top priorities of the Drug Enforcement Administration. The life sentence should serve as a warning to all medical professionals that if you prescribe medication for personal gain, with no consideration for the well-being of others, you will be investigated and prosecuted to the fullest extent of the law.[5] Eil Aff., ¶23.

Since January 2012, Plaintiff has been attempting to obtain the trial exhibits so that he can see what the jury saw when it decided to find Volkman guilty on twenty separate counts. Eil Aff., ¶28. Following the verdict, Plaintiff first reached out to the clerk of the U.S. District Court in Cincinnati, the clerk of the Sixth Circuit Court of Appeals (also in Cincinnati), Attorney Oakley, and Judge Beckwith, to request access to the exhibits from the Volkman trial. All of these requests were denied, and both Attorney Oakley and Judge Beckwith instructed or assured Plaintiff that FOIA was the proper avenue for accessing these materials.

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[5] The DEA has continued to highlight the significance of Volkman's case, even years after his conviction. In June and November 2012, the DEA presented slideshows to the Arizona Pharmacists Association and National Conference on Pharmaceuticals and Chemical Diversion, respectively, which both noted Volkman's case. In October 2015, the DEA similarly presented to the National Association of State Chief Administrators, wherein it discussed Volkman's case. In 2012, the DEA featured Volkman's sentencing as one of its "Top Stories" of the year. Eil Aff., ¶¶24-27.

Following this advice, Plaintiff filed the FOIA Request on February 1, 2012. The Executive Office of U.S. Attorneys ("EOUSA") acknowledged receipt of this request on February 28, 2012. Nine months later, the EOUSA transferred the request to Defendant, stating, in a November 28, 2012 letter, "pages originated with another government component."

Upon information and belief, Defendant received the FOIA Request on December 19, 2012. Eil Aff., ¶37. From May 7, 2013 to March 12, 2015 (one year, ten months, and five days), Defendant made a total of ten partial releases of information, withholding 14,000 pages of the 16,012 pages it reviewed. Eil Aff., ¶39.[6] Furthermore, hundreds of the pages the DEA actually produced to Plaintiff were largely redacted, making these documents effectively no more than blank pages. These pages included blank patient-examination sheets and slideshow pages with all substantive information redacted. Eil Aff., ¶39. The DEA relied on exemptions set forth in FOIA, arguing that the documents withheld or redacted fell outside the scope of the FOIA scheme.[7] Eil Aff., ¶39. Specifically, as discussed below, the DEA withheld the bulk of the documents because of purported privacy concerns.[8] To date, Plaintiff has received only a small fraction of the evidence shown to the jury during this trial.

As discussed in detail below, Plaintiff believes that the DEA wrongfully withheld and redacted public information (trial exhibits that were filed under no protective seal). Plaintiff respectfully requests that this Court grant summary judgment in his favor, find that the stated FOIA exemptions do not apply to the documents requested and order that the DEA provide the

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[6] It is noteworthy that in one case, six months and twenty one days passed between postmarks of partial-fulfillment packages. In another instance, six months and nine days passed between subsequent partial-fulfillment packages. Eil Aff., ¶39.

[7] As discussed in detail below, after this lawsuit commenced, the DOJ, on the DEA's behalf, provided a response to the FOIA Request. Eil Aff., ¶45.

[8] The DEA also withheld or redacted documents based on other exemptions. Because the most recent production (by the DOJ) does not cite these particular exemptions, Plaintiff does not detail them herein.

requested documents in their original form in response to Plaintiff's four-year old request.[9] Because all of Plaintiff's previous, non-FOIA requests for this access were denied, this request – and, thus, this lawsuit – represents the United States public's sole opportunity to access evidence from one of the country's most significant prescription drug-dealing prosecutions.

III. LEGAL ARGUMENT

A. THERE IS A PRESUMPTION OF DISCLOSURE UNDER FOIA AND IT IS THE GOVERNMENT'S BURDEN TO SHOW THAT FOIA EXEMPTIONS APPLY TO THE REQUESTED INFORMATION

"FOIA is an important tool in holding the government accountable because it provides citizens a means to 'know what their government is up to.' " Stalcup v. CIA, 768 F.3d 65, 69 (1st Cir. 2014) (quoting Carpenter v. U.S. Dep't of Justice, 470 F.3d 434, 437 (1st Cir. 2006)). In fact, "FOIA was intended to expose the operations of federal agencies 'to the light of public scrutiny.' " Carpenter, 470 F.3d at 437 (citing Dep't of the Air Force v. Rose, 425 U.S. 352, 372, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)). FOIA seeks to prevent "the development and application of a body of 'secret law.' " Providence Journal Co. v. United States Dep't of Army, 981 F.2d 552, 556 (1st Cir. 1992). Further, FOIA promotes an informed citizenry, which is "vital to the functioning of a democratic society." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978).

Thus, FOIA "presumes public entitlement to agency information[.]" Providence Journal Co., 981 F.2d at 556. In response to a FOIA request, the governmental agency must promptly make available to any person those materials in the possession of the agency, unless the agency can establish that the materials fall within one of nine exemptions. Carpenter, 470 F.3d at 438

[9] Plaintiff is not the only member of the general public who has been forced to deal with extraordinarily long delay with respect to FOIA requests. In January 2016, the United States House of Representatives Committee on Oversight and Government Reform issued a report entitled, "FOIA Is Broken." This report highlighted Plaintiff's, and others', attempts to access what should be publically available information. Eil Aff., ¶53.

(citing 5 U.S.C. § 552(a)(3)). The withholding agency, in this case, the DEA, has the burden to establish its right to an FOIA exemption. In order "[t]o fulfill the broad purposes of FOIA, [the courts] construe these exemptions narrowly. Stalcup, 768 F.3d at 69 (citing FBI v. Abramson, 456 U.S. 615, 630, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982)).

As discussed above, Defendant primarily relied upon two exemptions: records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (§552(b)(7)(C)) or "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law[.]" §552(b)(7)(E).

Further, after Plaintiff filed the instant lawsuit, the DOJ, on Defendant's behalf, produced documents to Plaintiff but withheld others, some in their entirety. Specifically, the DOJ redacted the following:

- Identifying information of third parties, including names, social security numbers, addresses, telephone numbers, dates of birth or death, medical and tax record numbers, insurance information, employment information and other particularly unique and sensitive personal and medical information, pursuant to §552(b)(6)[10] and (b)(7)(C)
- Identifying information of criminal investigators, pursuant to §552(b)(6), (b)(7)(C) and (b)(7)(f); and
- DEA numbers, pursuant to §552(b)(7)(e).[11]

Additionally, the DOJ withheld in their entirety

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[10] This exemption provides that "[m]aterials contained in sensitive records such as personnel or medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure under FOIA.

[11] Plaintiff does not pursue disclosure of either the identifying information of criminal investigators or DEA numbers.

- Medical records of an individual named in the transcript of the Volkman trial, pursuant to §552(b)(6) and (b)(7)(C), including this individual's medical records and a video recording of a medical visit;

- Detailed autopsy and toxicology reports, reports of post-mortem exams and photographs of deceases patients, pursuant to §552(b)(6) and (b)(7)(C); and

- Tax records of an individual, pursuant to §552(b)(7)(C). Eil Aff., ¶¶45.

In total, the DOJ produced to Plaintiff 3,813 pages – including the redactions noted above – and withheld 10,943 pages. Eil Aff., ¶46. Defendant must now establish that these exemptions apply to the information withheld and redacted. For the reasons provided below, it cannot meet its burden as a matter of law.

B. The Public Interest of the Requested Information Outweighs Any Alleged Privacy Interests

i. The Applicable Balancing Test

FOIA "[e]xemption 7(C) permits the government to withhold information 'compiled for law enforcement purposes' when the release of that information 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' " Moffat v. United States DOJ, 716 F.3d 244, 250-51 (1st Cir. 2013). Exemption 6 "protects from disclosure 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' " Union Leader Corp. v. U.S. Dep't of Homeland Security, 749 F.3d 45, 50 n. 4 (1st Cir. 2014) (citing 5 USC §552(b)(6)). Exemption 6 is less protective of personal privacy than 7(C). Id.

When the government relies on either of these exemptions, a court must balance the privacy interests against the public interest in disclosure of the requested information. Moffat, 716 F.3d at 251 (citing Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993)). "The issue for the Court is whether disclosure would promote the purpose of FOIA in 'opening agency action to the

light of public scrutiny[.]' " Lardner v. U.S. Dep't of Justice, 2005 U.S. Dist. LEXIS 5465, * 68 (D.D.C. March 31, 2005). " 'Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose.' " Id. at *65 (citing U.S. DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989)).

ii. The Government Has Not Adequately Established Relevant Privacy Interests

The government has identified several categories of information that it contends implicates the privacy of third party individuals, but fails to detail those privacy concerns. While Plaintiff concedes that individuals may have a privacy interest in some of the identified information, the government goes too far. In ACLU v. U.S. Dep't of Homeland Security, the Court held that a detainee's medical or psychological issues did not implicate a privacy interest because the identity of the individual was not sought or revealed. 973 F.Supp.2d 306, 315 (S.D.N.Y. 20130). In Charles v. Office of the Armed Forces Medical Examiner, the Court similarly held that there was no privacy interest in autopsy reports (again where personally identifiable information was redacted), because "the defendants have not shown that family members would be able to discern which redacted records relate to their deceased family member[.]" 935 F.Supp.2d 86, 99 (D.D.C. 2013) (comparing Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004)). The Court held that "without demonstrating that family members *will* encounter the disclosed information, *and* be able to discern that a redacted report relates to their family member, the defendants present no more than a mere possibility of an invasion of personal privacy and that is insufficient to find that Exemption 6 applies." Id. (emphases in original).[12]

[12] As noted, Plaintiff concedes that there may be some privacy interests in some of the materials withheld; however, the government is required to disclose all reasonably segregable, non-exempt portions of the records. See Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 982-983 (1st Cir. 1985). In determining

iii. Plaintiff Has Identified a Clear Public Interest

Even if Defendant can identify any legitimate privacy interests, Plaintiff can articulate a legitimate public interest in the requested information being disclosed. "The public interest FOIA seeks to uphold is the right of citizens to understand and obtain information about the workings of their own government." Moffat, 716 F.3d at 252 (citing Maynard, 986 F.2d at 566). In Carpenter, the Court held that "[t]he asserted public interest must shed light on a federal agency's performance of its statutory duties." Carpenter, 470 F.3d at 440 (citing Reporters Comm., 489 U.S. at 773 and Maynard, 986 F.2d at 566). "Indeed, the 'core purpose' of the FOIA, to which the public interest must relate, is to ensure that government activities are open to public scrutiny, not that information about private citizens, which happens to be in the government's possession, be disclosed." Id. at 441 (citing Reporters Comm., 489 U.S. at 774; Maynard, 986 F.2d at 566).

Here, the public has a legitimate interest in knowing how the DEA investigates – and the federal government prosecutes – physicians who unlawfully prescribe painkillers, an enforcement measure that Defendant has touted both generally and with respect to this particular case. See Parker v. U.S. DOJ, 852 F.Supp.2d 1, 13 (D.D.C. 2012) ("there is a valid public interest in knowing how [the] DOJ handles the investigation of unlicensed attorneys.") See also Lurie v. Dep't of Army, 970 F. Supp. 19, 37 (D.D.C. 1997) ("The public interest also extends to knowing whether an investigation was comprehensive and that the agency imposed adequate

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segregability, the Court must construe the exemptions narrowly with the emphasis on disclosure. Id. "The agency has the burden to demonstrate that it disclosed all reasonably segregable material. To meet its burden, 'the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.' ' " Charles, 935 F.Supp.2d at 95 (internal citations omitted). Further, "the primary purpose of the statute is to prevent 'a rubber stamp 'top secret' mentality behind which legitimately disclosable documents can be shielded.' " Wightman, 755 F.2d at 983 (quoting Conoco Inc. v. U.S. Department of Justice, 687 F.2d 724, 726 (3rd Cir. 1982)). Here, the government has withheld nearly 11,000 pages, consisting of exhibits in their entirety. Plaintiff contends that even where legitimate privacy interests are at play, the government has the burden to show why disclosable information cannot be segregated.

disciplinary measures.") Furthermore, the First Circuit has noted that a governmental agency may implicitly acknowledge the public interest in "knowing what it is up to" when it issued a press release "trumpeting" its operations. See Union Leader, 749 F.3d at 156.

As stated herein, from the beginning to the end of Volkman's trial, to post-conviction, Defendant has touted its investigation, the government's prosecution of Volkman, and the general significance of the case. Defendant has also stated that Volkman's prosecution should serve as a warning to others. The government cannot on the one hand hold this case up as an example of how it investigates and prosecutes diversion cases and on the other state that the majority of the evidence used to convict such a defendant is not actually available to the public. FOIA is meant to prevent such "secret law." The general public clearly has an interest in knowing how Volkman was investigated and prosecuted.[13] And, in the years since the Volkman trial, the United States' prescription drug diversion, abuse, addiction, and overdose problems have only worsened. The Volkman case, by Defendant's own repeated admission – for example, in press releases where Volkman is described as "The Largest Physician Dispenser of Oxycodone In the Country Betweeen 2003 and 2005" or alleged to have caused the deaths of "at least 14 patients" – represents a crucial chapter in the rise of the prescription drug abuse and overdose "epidemic" the White House described in an April 2011 report.[14] Eil Aff., ¶¶21, 49.

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[13] Plaintiff's difficulty accessing evidence from the Volkman trial presents a stark contrast the accessibility of trial evidence in other federal court districts. For example, since July of 2006, the U.S. District Court for the Eastern District of Virginia has hosted a website (link: http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits) offering, "link[s] to all 1,202 exhibits admitted into evidence during the trial of U.S. v. [9/11 co-conspirator Zacarias] Moussaoui, with the exception of seven that are classified or otherwise remain under seal," according to the homepage. These exhibits – which include emails, photographs, credit card receipts, maps of the World Trade Center, video of the 9/11 attacks, and recordings of 911 dispatchers – are accessible to anyone, anywhere in the world, at any time of day, in a matter of seconds. Eil Aff., ¶51.

[14] Few things speak to the enduring – if not increasing – relevance of the Volkman trial and its exhibits than a recent New York Times "Room for Debate" online feature titled, "Prosecuting Doctors in Prescription Drug Overdose Deaths[.]" Eil Aff., ¶49. The forum features op-eds from three experts: a former DEA official, the executive director of Physicians for Responsible Opioid Prescribing and a law and health care professor. The discussion centers around the explosion of drug overdoses around the country, "fueled in part by addiction to

Furthermore, some courts have held that where the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requestor must establish more than a bare suspicion in order to obtain disclosure. Union Leader, 749 F.3d at 54. In New York Times Co. v. U.S. Department of Homeland Security, 959 F. Supp. 2d 449, 456 (S.D.N.Y. 2013), the Court held that because the plaintiffs were able to learn through diligent reporting of several questionable exercises of the government's discretion, the allegations of impropriety were based on more than a "bare suspicion" and that the requested information would further the legitimate interest in knowing how government agencies make decisions. Similarly, in Union Leader, the plaintiff articulated evidence of one instance that would warrant a belief by a reasonable person that negligence might have occurred by the government. Here, the government knew that Plaintiff is a journalist and subpoenaed him (and therefore kept him from trial) but never actually called him to testify. Further, prior to the trial, at least one potential witness reported to Plaintiff that a DEA agent instructed her not to speak with Plaintiff and Plaintiff himself was warned by a DEA agent of the possibility of being charged with witness tampering while he was conducting pre-trial reporting. The resistance to Plaintiff's FOIA Request is just another smokescreen – the latest in a series of events restricting his access to a public trial. There is therefore sufficient evidence that there might have been negligence or other wrongdoing by Defendant such that he has identified a valid public interest.

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prescription painkillers." Notably, the forum mentioned a physician who was recently sentenced to 30 years to life in prison because her overprescribing of drugs led to the overdose deaths of patients. The Commentators stated that "[i]t was apparently the first such conviction in the United States." Certainly, this conviction and sentencing which came five years after Volkman's was not the first. The Volkman trial – which remains significantly obscured from public view, due to Defendant's years-long pattern of denials, delays, withholding, and redaction – is centrally relevant to, and yet absent from, this recent discussion in one of the United States' premier newspapers.

iv. The Public Interest Outweighs Any Purported Privacy Interest

Plaintiff has met his burden by identifying a legitimate public interest. The Court must now weigh this interest against any privacy interest to determine whether the requested information – which was already shown in an open court, under no seal, and then, as discussed below, shown again, in part, by prosecutors after the trial - should be disclosed. See Rodriguez v. United States Dep't of Army, 31 F. Supp. 3d 218, 233 (D.D.C. 2014) (holding that an identified public interest must be balanced against the privacy interest). The documents that Plaintiff requests – the very information which led a jury to convict Volkman and a judge to later sentence him to four life sentences – would certainly forward the public interest in "knowing what Defendant is up to." This is the very key to understanding how Defendant investigated and the government prosecuted Volkman in a case that Defendant itself has stated should serve as a reminder to the public about its enforcement efforts related to the unlawful prescriptions of narcotics.

Further, Plaintiff acknowledges that while the previous public disclosure of all of the exhibits at trial does not waive any legitimate privacy interests, the Court should still consider these circumstances in Plaintiff's favor when balancing the interests. See Parker, 852 F.Supp. 2d at 13 (holding that while publicity of the requested information does not waive a right to privacy, it may factor into the ultimate balance of the public and private interests).

Lastly, there are certain trial exhibits which Plaintiff contends remain within the public sphere and therefore, even if they were subject to any FOIA exemptions, the information contained in these exhibits can no longer be protected by the aforementioned FOIA exemptions. Specifically, Plaintiff learned that in February 2013, in response to Volkman's appeal of his conviction, the government uploaded sixteen complete or partial trial exhibits (60 pages) to

PACER, which were either unredacted or lightly redacted, such that the redactions are meaningless. Eil Aff., ¶38. These documents – including death certificates, toxicology reports, medical files and prescriptions slips – are some of the same documents which Defendant has refused to produce to Defendant, citing FOIA exemptions. Not only is this approach inconsistent, but more importantly, it shows that certain documents – and therefore the information contained therein – have now been preserved in the permanent public record such that they have lost their "protective cloak." See Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999)) (holding that materials normally immunized from disclosure under FOIA "lose their protective cloak once disclosed and preserved in a permanent public record.") The logic of this public domain doctrine is that where the information requested is truly public, enforcement of an exemption can no longer fulfill its purpose. Id.; see also Muslim Advocates v. United States DOJ, 833 F. Supp. 2d 92, 99 (D.D.C. 2011). Here, these documents that Defendant has withheld from Plaintiff are now public. The particular information about specific patients contained in these documents – and other documents containing the same information – should be disclosed to Plaintiff without further ado. After all, FOIA exemptions cloak the information, not the document, and no FOIA exemption can continue to protect this information that the government has permanently published on PACER.

IV. CONCLUSION

Based on the foregoing – including the fact that Plaintiff's FOIA Request was received and acknowledged more than four years ago – Plaintiff respectfully requests that this Court grant it summary judgment and order that Defendant produce the wrongfully withheld documents post haste and any other relief this Court deems appropriate.[15]

[15] Plaintiff specifically reserves his right to obtain a Vaughan index from Defendant.

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CERTIFICATION

I hereby certify that on the 14th day of March, 2016, I filed and served this document electronically through the Court's CM/ECF system to:

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/s/ Neal J. McNamara